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NO. 83-1101

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARK DAVID NILES,

Petitioner

VS.

THE UNIVERSITY INTERSCHOLASTIC LEAGUE, ET AL.

Respondents

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Petitioner's cause of action become moot?

2. Has Petitioner stated a cause of action upon which relief can be granted?

PARTIES TO THE PROCEEDING

The Petitioner is:
Mark David Niles

The Respondent is:
The University Interscholastic League

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The University Interscholastic League (UIL) files this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

1. The opinion of the District Court is not reported but appears as Appendix "B" in the Petition for Certiorari.

2. The opinion of the Court of Appeals is reported in 715 F.2d 1027.

MOOTNESS

This lawsuit was originally brought by Mark David Niles in the District Court for the Southern District of Texas. Subsequently a Motion to Intervene was filed by Les Mattinson; a motion to disallow this intervention was

filed by the Respondent, but neither motion was ruled on by the District Court. After several preliminary skirmishes the District Court entered a Final Judgment dismissing the cause of action for lack of subject matter jurisdiction. The Court of appeals affirmed the judgment, but based its affirmation on the proposition that "the Plaintiff did fail to state a claim upon which relief could be granted...". The purported intervenor, Les Mattinson, is not a party to the Petition for Certiorari; this was not a class action.

The record reflects that, at the time of the filing of this lawsuit in November, 1982, Niles was a Senior student in high school. Niles graduated in May, 1983, thereby rendering his lawsuit moot.[1]

An actual controversy must exist at stages of Appellate or Certiorari review, and not simply at the date that the action is initiated. *Roe v. Wade*, 410 U.S. 113 (1973); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *Golden vs. Zwickler*, 394 U.S. 103 (1969); *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Since there is not a viable Plaintiff to prosecute this lawsuit, Petitioner has failed to invoke the jurisdiction of this Court; the lawsuit is moot.

HAS THE PETITIONER STATED A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED?

The Court of Appeals correctly held that

> "Forthrightly stated, the gravamen of the complaint here is the denial of the right to participate in in-

1. Respondent contends that the lawsuit became moot even before Niles' graduation for the reason that he was no longer enrolled in any Texas High School for which he desired to participate in Texas interscholastic activities, having again moved to California.

terscholastic sports, not the rights to interstate travel, to earn a living or to live with or apart from someone's family. Indeed, in cases such as this and *Walsh*, it would appear that such rights will rarely, if ever, be implicated so seriously as to state claim upon which relief can be granted."

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied, first, for the reason that the cause is now moot. Second, the cases are clear that the right to participate in interscholastic athletics does not rise to constitutional heights. *Kite v. Marshall*, 661 F.2d 1027 (5th Cir. 1982), cert. den., 457 U.S. 1120 (1982); *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152 (5th Cir. 1980), cert. den. 449 U.S. 1114, (1981), *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970).

Although the Petitioner moved for leave to allow an intervention, such leave was never granted by the District Court. Judgment was renderd by the District Court dismissing the lawsuit; this judgment was affirmed by the Court of Appeals. Upon dismissing the Plaintiff's complaint, the Distict Court held that in view of such dismissal, it was unnecessary to pass upon the outstanding motions, including the motion for leave to intervene. Thus, the intervention was never consummated. The would-be intervenor alleged facts which, if true, would constitute a seperate and distinct cause of action. If the failure of the District Court to rule on such motion was tantamount to a denial, no clear abuse of discretion is apparent; the exercise of discretion in refusing a motion to intervene is not reviewable unless a clear abuse of discretion is shown. *Allen Calculators vs. National Cash Register Co.*, 322 U.S. 137 (1944). Also see *Korioth vs. Briscoe*, 523 F.2d 1271, 5th Cir. (1975).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the opinion of the Court of Appeals for the Fifth Circuit is correct, and for reasons set out in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert W. Gauss, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of Respondents' Brief in Opposition has been served upon counsel for the Petitioners by placing same in the United States mail, certified, return receipt requested, addressed to Anthony D. Sheppard, One Greenway Plaza East, Suite 820, Houston, Texas 77046 on this the _____ day of January, 1984.

ROBERT W. GAUSS